No. 84-925

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MARINE TRANSPORT CORP.,

Petitioner,

—v.—

JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT W. SANDERS, THOMAS E. MORAN, as Trustees of the NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT W. SANDERS, THOMAS E. MORAN, as Trustees of the NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND,

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RESPONDENTS' BRIEF IN OPPOSITION

The decisions below, the basis on which this Court's jurisdiction is invoked, and the statutory provisions involved, are set out at pp. 2-8 of the petition for a writ of certiorari (hereafter cited as "Pet.").

STATEMENT OF THE CASE

This is an action by Trustees of employee benefit Pension and Insurance (welfare) Funds against an employer for delin-

quent contributions required under a collective bargaining agreement. Jurisdiction is grounded in Section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 and ERISA Section 502, 29 U.S.C. § 1132. Petitioner sought to repudiate the agreement several days after it was consummated, executed and ratified by the union membership. Both courts below held that petitioner was bound by the agreement and obligated to pay the prescribed contributions for the contractual term. The judgment is for the contract contributions, interest as prescribed by the governing statute (ERISA), and attorneys fees.

The Bargaining History

Collective bargaining in the towing and transportation industry in the Port of New York has long been conducted through Local 333, United Marine Division ("Local 333" or "the Union"), as employee representative, and the Marine Towing & Transportation Industry Employers' Association (the "Association"), an association representing the companies in this multi-employer bargaining unit. The collective agreements are negotiated and signed by the Association on behalf of its members, who are listed toward the end of the agreement. Since at least the 1950's, the collective agreements have provided for both a Pension Fund and an Insurance Fund.

Petitioner, ("General Marine"), an operator of sludge or garbage disposal vessels, became a member of the Association and a Fund participant in 1962. Thereafter, until April 1, 1976, it submitted the required reports and made the required contributions to both Funds. During these years, including the 1973-1976 contract period, the Funds provided full coverage to all eligible reported employees. During 1973-1976, General Marine employed, and covered for pension and insurance purposes, crew members who worked aboard the tugs and barges operated by General Marine's affiliate, Berman Enterprises. The Pension Fund accorded them the pension credit earned by their hours of reported employment; and some

employees, including persons who after 1977 worked for Berman under the agreement of another labor organization, the Marine Engineers Beneficial Association ("MEBA"), are vested and will receive pension benefits upon attaining retirement age and ceasing employment in the towing industry. The Insurance Fund purchased insurance coverage for all eligible reported employees, including those who subsequently worked under the Berman-MEBA contract; and those employees and dependents who incurred medical and hospital expenses did receive benefits.

The 1976 Negotiations

Throughout the 1976 negotiations, General Marine was again represented by the Association, both through its continued membership and specific authorization. Shortly before the contract expiration deadline of March 31, 1976, the Union and the Association reached full agreement; and on March 26, 1976 they executed a Memorandum of Agreement containing the contract changes. A fully integrated agreement embodying those changes was also prepared and signed. General Marine was again listed as one of the "Owners and Operators on behalf of which this Agreement is signed. . . ."

The agreement was then distributed to the various employers. On April 13, 1976, General Marine sent virtually identical letters to the Association and the Union, proclaiming that it would not be bound by the new agreement, principally because of a new provision, typical of maritime industry agreements, applying the contract to "subsidiaries and affiliates" of the employers. Petitioner objected to application of the agreement to its affiliate, Berman Enterprises, a tug and barge operator under common ownership, management and labor relations control, with which petitioner regularly interchanged both employees and funds.

General Marine made no contributions to either the Pension Fund or the Insurance Fund from April 1, 1976 onward. The Trustees sought, and obtained, recovery for unpaid contribu-

tions required under the 1976-1979 agreement based on employment aboard petitioner's two sludge vessels. No claim was made for work performed by any crew members aboard any of the so-called Berman tugs and barges.

The NLRB Proceedings

After General Marine's attempt to repudiate the agreement, a representation petition was filed with the Board, and lengthy proceedings ensued on the "contract bar" effect of the 1976-1979 Association-Union agreement.[1] In December, 1976, the Regional Director held that the contract was binding upon General Marine, that it did cover the two sludge vessels, and that it therefore constituted a contract bar (Pet. App. 122a). The Labor Board affirmed this decision. An election was ordered for employees aboard Berman vessels only; and that election was won by another union, MEBA.

Local 333 then filed unfair labor practice charges against General Marine based on its repudiation of the collective agreement. The Regional Director issued a complaint, and, after hearing, both the Administrative Law Judge and the Board found that General Marine was a party to, and bound by, the 1976-1979 multi-employer agreement and had wrongfully repudiated it. (Pet. App. 99a). In denying enforcement, the Court of Appeals for the Second Circuit made no contrary determination and did not reach the merits of the Board's decision. Rather, the Court concluded that the proceeding was time-barred by the six-months statute of limitations contained in Section 10(b) of the Act, 29 U.S.C. § 160(b). *General Marine Transport Corp. v. NLRB*, 619 F.2d 180 (2d Cir. 1980). Respondent Trustees were not parties to either the Board or Court proceeding.

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1 The Union had filed earlier charges with the Labor Board against both General Marine and Berman jointly, and these were dismissed by the Regional Director because they included Berman as a joint party respondent. The 1976-1979 agreement was never applied to Berman, and this action does not involve Berman, its vessels, operations, or employees. The first charge filed against petitioner alone resulted in the issuance of a complaint.

The Proceedings Below

The complaint herein was initially interposed by the Trustees on March 1, 1977 as a counterclaim to an antitrust complaint brought by General Marine and Berman against the Union, the Association and its principal employer members, and the Trustees.[2] After discovery, General Marine and Berman decided to drop the Trustees as parties defendant, and it was stipulated, in November 1978, that the Trustees' counterclaim would be severed and asserted through separate complaint. On December 29, 1978, this action was instituted. Defendant then counterclaimed, seeking repayment to it, or alternatively to "a receiver", of that portion of the 1973-1976 contributions based on employment aboard non-sludge boats.

On summary judgment motions by both sides, the District Court granted summary judgment to plaintiffs on the issue of liability (Pet. App. 26a-41a). Thereafter, a "damages" trial was held on the amount of unpaid contributions due under the contract. At about the same time, both sides moved for summary judgment on the issues presented by the counterclaim. In a single decision, the District Court determined the disputed damages issues and granted plaintiffs' motion dismissing the counterclaim (Pet. App. 42a-59a). Having entered judgment for the Trustees (Pet. App. 72a-73a), the District Court then entertained an application for attorneys' fees, as provided both by ERISA and the collective agreement, and awarded the amount it deemed reasonable (Pet. App. 63a-70a).[3] On appeal, the Court of Appeals affirmed (Pet. App. 1a-25a), and rehearing was denied. (Pet. App. 71a).

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2 The antitrust claim was bottomed, *inter alia*, on the same contract provision invoked by petitioner as a basis for disavowing the 1976-1979 collective agreement. The action was tried to a jury which decided for defendants, and on appeal that judgment was affirmed. After reviewing the Berman-General Marine mode of operations, the Court of Appeals sustained the legitimacy of the challenged contract provisions. *Berman Enterprises, Inc. v. Local 333, et. al.*, 644 F.2d 930 (2d Cir. 1981), *cert. denied*, 454 U.S. 965 (1981).

3 In a separate opinion after rendition of this Court's decision in *Del Costello v. Teamsters*, 462 U.S. 151 (1983), the District Court also declined

ARGUMENT

Despite its complex procedural history, this is a relatively simple, straightforward trust fund collection case, which presents no issues of general importance. The decision of the Court of Appeals does not conflict with the decisions of any other Circuit and scrupulously follows the controlling precedents of this Court. It fully accords with the legislative policy of effecting the collection of delinquent employer contributions to employee benefit trust funds. Moreover, this case does not present the principal issues urged by petitioner as appropriate for review.

I. THERE IS NO CONFLICT IN THIS CASE BETWEEN THE EXERCISE OF JUDICIAL POWER UNDER SECTION 301 AND ERISA AND THE DETERMINATION OF APPROPRIATE BARGAINING UNITS BY THE NLRB

A. Contrary to the petitioner's argument, this case simply does not present the issue perceived by the dissenting Justices in *Teamsters Local 70 v. California Consolidators, Inc.* 693 F.2d 81 (9th Cir. 1982), *cert. denied*, 53 U.S.L.W. 3263 (Oct. 9, 1984) (dissenting opinion). The only litigated decisions rendered by the NLRB and its Regional Director reached the same conclusion of the judicial decisions in this action. The Regional Director upheld the 1976-1979 Local 333-Association collective agreement as an effective contract bar to MEBA's representation petition in so far as that petition sought to include the two General Marine sludge vessels and their crew members. As a result, General Marine employees were excluded from the representation election. In the subsequent unfair labor practice proceeding, the Board held that General Marine *did* commit an unfair labor practice in repudiating and dishonoring the Local 333-Association agreement. The Court of Appeals refused to

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to apply the NLRB's six-months statute of limitation to this breach of contract case (Pet. App. 60a-62a).

enforce on statute of limitations grounds only. Thus, the suggestion of actual inconsistency with NLRB determinations is unfounded. Moreover, in light of the Section § 10(b) barrier and the expiration of the 1976-1979 agreement, there is no potential of future inconsistent NLRB determination.

Petitioner urges that Section 301 jurisdiction may depend upon the characterization of issues as "primarily representational or primarily contractual." But this case presents no such question. General Marine was found liable because it has long been a party to collective agreements with Local 333 and a contributing employer to the Pension and Insurance Funds. It not only continued its Association membership and Association bargaining authority through the end of the 1976 negotiations, it rejected the opportunity to withdraw from the industry-wide bargaining before the new contract was consummated, with full knowledge of the anticipated modifications which it later found objectionable. (Pet. App. 4a-5a).

Thus, unlike the cases cited by petitioner, here a labor organization is not seeking to bind a non-party to a new agreement through invocation of some NLRB doctrine, such as successorship, accretion, *alter ego*, or "single employer," thus raising potential representational questions. Rather, Fund Trustees have sued a direct party to the contract who has long been part of the historic bargaining unit. The issue, therefore, is contractual not representational.

The parallel to petitioner's cited cases would have been an attempt by the Trustees to collect contributions from Berman under the contractual "subsidiaries and affiliates" cluase and the "single employer" doctrine (*see, Berman Enterprises v. Local 333*, 644 F.2d 930, 935) at least for the period prior to certification of MEBA in 1977. But no such claim has ever been brought, and General Marine's liability raises none of the issues suggested by petitioner. Accordingly, there is no conflict between Circuits, no conflict with NLRB jurisdiction, and no question meriting review.

B. Point III of the petition argues that if an employer has no duty to bargain under the NLRA, then no § 301 action should lie. Otherwise, petitioner claims, it may be unable to fulfill its statutory duty to bargain with another union for a different contract. (Pet. p. 17). Again, petitioner misconceives the facts, the issues in this case, and the controlling law.

First, this argument ignores the decision of the Regional Director, affirmed by the Board, that the 1976-1979 Association-Local 333 agreement *did* constitute a contract bar to MEBA's petition. The speculative possibility that the judgment in this case might somehow interfere with the duty to bargain with another union has already been foreclosed by the NLRB's determination.

Second, petitioner persists in equating the Second Circuit's earlier § 10(b) decision with a holding that petitioner was under no duty to bargain or to observe the collective agreement. In this case, the same Second Circuit properly rejected that argument. Hence, petitioner's underlying assumption that either the Labor Board or the Court has sustained its right to dishonor the agreement and absolved it of all consequences in doing so is mistaken. Moreover, the notion that the expiration of the § 10(b) period, which does nothing more than preclude Labor Board relief against a violation of the NLRA, extinguishes a § 301 breach of contract claim—to say nothing of an ERISA claim founded on the same facts—was put to rest in this Court's seminal § 301 decision in *Smith v. Evening News Association*, 371 U.S. 195 (1962); see n.5, accompanying text at pp. 197-198, and dissenting opinion.

Finally, unlike *Garment Workers v. NLRB*, 366 U.S. 731 (1960), here the union did represent a majority of employees in the multi-employer bargaining unit, and General Marine was for more than fifteen years a part of that historic unit and a participating employer in the benefit Funds.

II. THE COURTS BELOW PROPERLY APPLIED THE STATE STATUTE OF LIMITATIONS GOVERNING BREACH OF CONTRACT ACTIONS

The petition asserts (p. 14) that the six-months limitation period of § 10(b) of the NLRA should apply, because the Trustees' claim is based upon a duty derived from the National Labor Relations Act to abide by a multiemployer collective agreement. Petitioner misconceives the nature and origin of its contractual obligation. The duty to comply with a collective agreement, whether multiemployer or individual employer, arises from the contract itself and antedates the adoption in 1935 of the NLRA or the adoption in 1947 of Section 301, LMRA and the Taft-Hartley amendments imposing statutory obligations upon unions. To be sure, Section 301—but not the NLRA—created a federal breach of contract claim, and national labor policy is implicated in the interpretation of collective agreements; but if petitioner is suggesting that prior to the adoption of the NLRA and its 1947 amendments, collective agreements were unenforceable pieces of paper that could be flouted with impunity, it is fundamentally mistaken. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 452 (1957); *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 445-447 (1955).

Petitioner contends that because a similar unfair labor practice charge has been held barred by the § 10(b) statute of limitations, this breach of contract action by Fund trustees should likewise be foreclosed. As noted above, in *Smith v. Evening News Association*, 371 U.S. 195, this Court expressly rejected a virtually identical contention.

Del Costello v. Teamsters, 462 U.S. 151 103 S.Ct. 2281 (1983), rests on the peculiar nature of a "fair representation" action; there the duty arises not out of express contract but "is implied under the scheme of the National Labor Relations Act." 103 S.Ct. at 2290. *Del Costello* did not purport to

overrule *Auto Workers v. Hoosier-Cardinal Corp.*, 383 U.S. 696 (1966) and, indeed, quoted approvingly from *Hoosier-Cardinal* that "an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement . . . closely ressembles an action for breach of contract cognizable at common law." 103 S.Ct. at 2289. This is precisely such an action.

The decisions of other Courts of Appeal since *Del Costello* have been consistent with the decision below. *Carpenters Local 1020 v. FMC Corp.*, 724 F.2d 815 (9th Cir. 1984); *Derwin v. General Dynamics Corp.*, 719 F.2d 484 (1st Cir. 1983); *IUE v. Ingram Mfg. Co.*, 715 F.2d 886 (5th Cir. 1983). Petitioner suggests no conflict among Circuits on this point, and we are aware of none.

The above considerations would amply justify the decision below under § 301, LMRA. But this action is also brought under the ERISA provisions authorizing, indeed mandating, Trustees' actions to collect delinquent contributions. Those provisions, found in 29 U.S.C. § 1132, were first adopted in 1974 and strengthened in 1980. See *Rosen v. Hotel and Restaurant Employees Union*, 637 F.2d 592, 600 (3d Cir. 1981). ERISA expresses the strong policy to assure the collection of delinquent employer contributions to trust funds. It is, of course, no part of the LMRA or NLRA; it represents national statutory policy in this area, independent of Section 301, LMRA. To impose a six-month statute of limitations on a monetary claim by Trustees for delinquent employer contributions would run strongly counter to ERISA's fundamental purposes.[4]

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4 ERISA does not contain its own statute of limitations applicable to fund collection actions, although it has a six-year statute for violations of other portions of the Act. 29 U.S.C. § 1113.

III. THE COURTS BELOW PROPERLY AWARDED INTEREST AND ATTORNEYS' FEES AS PRESCRIBED BY THE APPLICABLE STATUTE IN EFFECT WHEN THIS CASE WAS DECIDED

Petitioner urges that the Court below erred in applying § 306 of the 1980 Multiemployer Pension Plan Amendment Act, ("MPPA") 94 Stat. 1295, 29 U.S.C. §§ 1132(g) and 1145, to this case. That issue, which involves only the amount of interest due, was decided in accordance with settled principles governing statutes enacted in the course of litigation; and the decision below accords with the conclusion reached by other courts. Morever, the issue is of sharply diminishing significance as 1980 recedes into the past and does not warrant review by this Court at this time.

Under ERISA, as adopted in 1974, trust fund fiduciaries acquired a federal right to enjoin acts violative of "the terms of the plan", "to redress such violations", and "to enforce the terms of the plan". § 1132(a)(3). Subsection (g) of that Section authorized a discretionary award of attorneys' fees.

The 1980 MPPA amendments added Section 1145, specifically requiring employers to make contractually-prescribed contributions to multi-employer plans, and Section 1132(g)(2), making attorneys' fees mandatory and also obligating defaulting employers to pay double interest at the contractual or § 6621 rate.[5]

Several Courts, in addition to the Court below, have applied the provisions of § 1132(g)(2) to trust fund collection actions, like this one, instituted before 1980 but coming to judgment afterwards. *Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co.*, 522 F.Supp. 919 (D. Mich.

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5 Here the contract did prescribe the rate of interest, and the contractual formula closely approximates the § 6621 rate. In § 1132(g)(2), Congress also authorized liquidated damages up to 20 percent. The trust instruments herein do not provide for liquidated damages, and plaintiffs neither sought nor obtained any.

1981); *San Pedro Fisherman's Welfare Trust Fund Local 33 v. DiBernardo*, 664 F.2d 1344 (9th Cir. 1982); *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1045 n. 37 (N.D. Ill. 1982); cf. *Bugher v. Consolidated X-Ray Service*, 705 F.2d 1426 (5th Cir. 1983) (applying the 1974 ERISA attorneys' fees provision to a suit initiated pre-ERISA). *Alco*, in particular, fully and persuasively analyzes the 1980 statute, its legislative purpose, and the governing authorities. As the Court observed in *Peick*, after reviewing the extensive regulation imposed on trust funds by the Internal Revenue Code, the LRMA, and the 1974 ERISA, and then sustaining application of the 1980 Amendments against a claim of surprise and manifest injustice:

> This development [the ERISA provisions] alone afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created. 539 F.Supp. at 1044-45.

The controlling principle is that stated by this Court in *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974):

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Petitioner cannot seriously claim that prior to 1980 it was unaware that a default in fund contributions would subject it to federal liability. See, e.g., 29 U.S.C. § 1132 (pre-1980); *Lewis v. Benedict Coal Co.*, 361 U.S. 459 (1960). Nothing in § 1132(g)(2) or its legislative history directs an exception to the general rule.

This Court recently considered the 1980 MPPA Act and sustained the retroactive imposition of withdrawal liability, emphasizing essentially the same legislative policy determinations that impelled the strengthening of the interest and attor-

neys fees provisions in § 1132. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S.Ct. 2709 (1984). That case involved a major new substantive liability, not merely the interest to be awarded on a previously established obligation and liability.

IV. THE COURTS BELOW PROPERLY DISMISSED THE COUNTERCLAIM SEEKING MANDATORY TRANSFER OF TRUST ASSETS TO THE MEBA FUND

Petitioner urges that this Court review the dismissal of the counterclaim which would have required the Trustees to transfer a portion of the trust assets to the MEBA Funds, as a consequence of the 1977 election of MEBA as representative of those General Marine employees who worked aboard the Berman vessels. Petitioner sought transfer of the contributions made on behalf of those employees during the 1973-1976 contract period on the ground that failure to do so would put respondents' Funds in noncompliance with the requirement of Section 302(c)(5), LMRA, 29 U.S.C. §186(c)(5) that a fund be "established . . . for the sole benefit of the employees of such employer . . . or of such employees jointly with the employees of other employers making similar payments. . . ."

To put the facts in perspective, respondents' Funds accorded full coverage for all these employees. The Insurance Fund not only paid all benefit claims, but more important—and far more expensive—purchased full hospitalization, medical and life insurance coverage for them for the entire 1973-1976 period. The Pension Fund has accorded eligibility and benefit credit for the entire period. Some employees who later joined the MEBA unit are vested under respondents' Pension Plan, and their eligibility credits and benefit levels would be reduced under petitioner's counterclaim; others are close to vesting and may achieve vesting if they work for an Association member.[6]

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6 The expulsion of Berman employees from Local 333 for dual unionism cannot affect their re-employment in the Association unit, NLRA, Section 8(a)(3) and (b)(2), 29 U.S.C. §158; and petitioner made no showing that it has.

Former General Marine employees who worked on Berman vessels have thereafter become employees of other Association members and accumulated additional credits thereby.

Not only was petitioner's counterclaim without factual or legal merit, but this is an inappropriate case to review the legal issue raised, inasmuch as petitioner clearly lacks standing to assert it.

A. Petitioner does not and cannot claim that its 1973-1976 contributions to respondents' trust funds should be returned to it. Neither ERISA, the Internal Revenue Code provisions prohibiting recapture of employer contributions to qualified trusts, nor the contract and trust instruments herein, would permit such a course. Rather, petitioner seeks mandatory transfer to the MEBA Funds. But, unlike the cases cited by petitioner, neither the trustees of those Funds, nor any employee, plan participant, or beneficiary, nor MEBA itself, has joined petitioner in its claim.

As both courts below noted, the counterclaim fails the threshhold test of standing: "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal Court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976), quoting *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975). A claimant must show that he has suffered "an actual injury" or "injury of fact". *Simon*, 426 U.S. at 40; *Valley Forge College v. Americans United*, 454 U.S. 464, 472-473 (1982).

The counterclaim, read most liberally, alleges injury only to the MEBA trusts. There is no allegation that General Marine "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct" of plaintiffs. *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

In fact, there is no allegation of injury to anyone, only "unjust enrichment" to plaintiffs' trusts; and that is factually

unfounded. But the standing requirement assumes the possibility of unredressed wrongs, if those directly injured choose not to sue.[7] The judicial process may not be converted into "a vehicle for the vindication of the value interests of concerned bystanders" *United States v. SCRAP*, 412 U.S. 669, 687 (1973), no matter how deeply felt. For this Court has squarely rejected "the idea that the judicial power requires nothing more for its invocation than important issues and able litigants. The existence of injured parties who might not wish to bring suit becomes irrelevant. . . ." *Valley Forge College v. Americans United, supra*, 454 U.S. at 489-490.

The counterclaim does not allege that petitioner would be benefitted if the MEBA trusts were enriched, and any such allegation would, in any event, be speculative and insufficient. For standing is not conferred by allegations that a claimant's "situation might be better had respondents acted otherwise and might improve were the court to afford relief." That kind of indirect benefit does not substitute for a showing that a claimant's "immediate and personal interests would be harmed." *Warth v. Seldin, supra*, 422 U.S. at 507; *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). As several cases have put it, such a claimant is not within the "protected zone of interests." *Valley Forge College v. Americans United, supra*, 454 U.S. at 475; *Association of Data Processing Service Org. v. Camp*, 397 U.S. 150, 153 (1970).

B. As stated above, the Insurance Fund purchased full coverage for the subsequently decertifying employees during the 1973-1976 period, and the Pension Fund granted them eligibility and benefit credits. Moreover, no case has suggested that Section 302 of the LMRA, 29 U.S.C. 186(c)(5) requires transfer of pension trust assets to voluntarily departing employees or their new pension fund.

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7 The counterclaim would have compelled transfer to the MEBA trusts of the liabilities as well as the assets attributable to the Berman employees.

A pension fund is necessarily predicated on long-range actuarial projections, vesting and "break-in-service" formulas, unfunded past service amortization, and similar considerations. Vesting requirements assume that many employees for whom contributions are made will never be eligible for benefits; and fund actuarial projections take this into account. *Aitken v. IP&GCU-Employer Retirement Fund*, 604 F.2d 1261, 1267 (9th Cir. 1979); *Phillips v. Kennedy*, 542 F.2d 52, 55 n. 8 (8th Cir. 1976). In imposing vesting standards in ERISA, Congress recognized this fact, too. 29 U.S.C. §1053. Thus the argument that plaintiffs' trust would somehow contravene the requirement of Section 302(c)(5) of the LMRA if the voluntary departure of some General Marine employees led to their failure to accumulate enough years of credited service for vested pension eligibility is without merit. They are no different from the many other employees who voluntarily depart after less than ten years in covered employment.

The 1980 amendments to ERISA, 29 U.S.C. §1415 provide for partition of pension funds upon changes in certified bargaining representative "occurring after April 28, 1980". Here the change as to some, but not all, of petitioner's employees occurred in early 1977.

Section 1415 integrates the withdrawal liability obligation imposed by the same 1980 Act into the overall scheme for fund transfers. If it did not, then the transferor fund would be twice injured: through loss of a contributing employer and through transfer of assets to another fund. Under Section 1415, the withdrawing employer must pay his withdrawal liability in full, calculated to take into account the impact of the transfer. The partition and withdrawal liability provisions have the same effective date, April 28, 1980.

Thus, were Section 1415 applicable, which it is not, respondents' pension fund might be required, in a suit by an injured party, to transfer assets and liabilities to the MEBA trust, but General Marine would be required to pay substantial withdrawal liability, which might well exceed the judgment herein.

The comprehensive regulatory scheme reflected in the 1980 Act constitutes another persuasive reason for rejecting petitioner's Section 302, LMRA argument. The courts lack power to compel General Marine to pay withdrawal liability or its equivalent for pre-1980 withdrawals. The court below correctly refused to construe another Act, with other objectives and policies altogether, to yield a distorted, one-sided mandatory transfer at odds with ERISA's carefully balanced statutory scheme.

C. The court below distinguished its own prior decision in *Local 50 Health Benefit Fund v. Local 3 Welfare Fund*, 733 F.2d (2d Cir. 1984) on the ground that here some General Marine employees continued to be covered employees under respondents' Funds, while in *Local 50*, the entire work force of a substantial employer certified another union and came under the coverage of another welfare fund. Petitioner criticizes that distinction, although it finds clear support in the statutory language on which petitioner relies. But surely the reading given by the Second Circuit to an earlier decision of the same court does not present an issue appropriate for resolution by this Court. And, in any event, the distinction drawn by the court below in this case is sound. Otherwise, as the Court of Appeals noted, the *Local 50* decision itself would be irreconcilable with this Court's decision in *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). Indeed, even as distinguished, we doubt that the *Local 50 rationale* can be reconciled with *Robinson's* holding that the "plain meaning [of the relevant language in §302(c)(5)] is simply that employer contributions must accrue to the benefit of employees and their dependents, to the exclusion of all others" (p. 570), and that "former employees and their families" may suffer loss of coverage without there being a violation of the statute. But that issue, too, is not presented by this case.

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For all the foregoing re
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sons, we respectfully urge that the
ari be denied.

Respectfully submitted,

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